

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-7026

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-7026

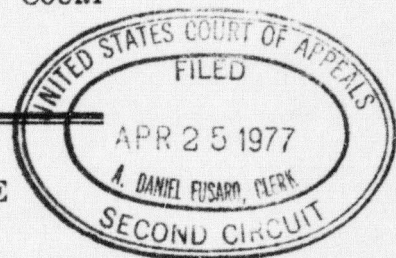
INTER-REGIONAL FINANCIAL GROUP, INC.,
Plaintiff-Appellee,

—V.—

CYRUS HASHEMI,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF OF THE PLAINTIFF-APPELLEE



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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 77-7026

INTER-REGIONAL FINANCIAL GROUP, INC.,
Plaintiff-Appellee,

v.

CYRUS HASHEMI,
Defendant-Appellant,

BRIEF OF THE PLAINTIFF-APPELLEE

Statement of the Issues

1. Does this court have jurisdiction to hear this purported appeal from the interlocutory attachment order of the district court?

2. Was the district court authorized to enter an order requiring defendant to bring securities located outside of the State of Connecticut into the State of Connecticut for the purpose of permitting the plaintiff to attach such securities?

Statement of the Case

This is an action by the plaintiff against the defendant for \$250,000 plus interest and attorneys' fees, which are due plaintiff from defendant under an Indemnity and Guaranty Agreement. (App. 16a-18a, see App. 8a et. seq.)*

In order to procure a \$250,000 loan for Coronado Group Ltd. ("Coronado") from Banque Scandinave en Suisse (See App. 11a-12a), plaintiff, a stockholder of Coronado, obtained a \$250,000 letter of credit from First National Bank of St. Paul, as security for said loan. (App. 32a-34a) Under plaintiff's application for said letter of credit, plaintiff agreed to reimburse First National Bank of St. Paul for any payments made under the letter of credit. (App. 35a-37a)

* Reference to "App." is to the defendant's "Appendix". Reference to "Supp. App." is to the Supplemental Appendix which is supplied by plaintiff.

In turn, under the Indemnity and Guaranty Agreement, defendant, who was then the president of Coronado, agreed to indemnify and hold plaintiff harmless for all sums which plaintiff might be called upon to pay as a result of this transaction. (App. 33a, 38a-40a)

On July 15, 1976, First National Bank of St. Paul paid \$250,000 to Banque Scandinave en Suisse under the letter of credit, and on the same day, plaintiff reimbursed the First National Bank of St. Paul. (App. 33a)

Plaintiff then made demand on defendant for reimbursement of the \$250,000, but defendant failed to make such reimbursement. (App. 33a)

Accordingly, this suit was instituted and an attachment was sought.

Annexed to the application for attachment order was a financial statement which defendant, an Iranian citizen living in Darien, Connecticut, had previously supplied to plaintiff. (App. 21a, et. seq.) This statement, dated as of December 31, 1973, shows defendant's total personal net worth as over \$2.8 million, including, inter alia, over \$2 million in securities, as well as real estate holdings in Paris, Switzerland and Connecticut, and substantial cash on deposit in the Banque Scandinave en Suisse.

However, in the course of the proceedings concerning the request for the attachment, defendant advised the court that

all of his securities were located outside the State of Connecticut. (App. 61a) Also, deposition testimony elicited admissions from the defendant that he had transferred title to his Connecticut home to his wife and claimed not to own any of the personal property located at his Connecticut house except his late model Mercedes-Benz automobile. (App. 68a-73a) In fact, he went so far as to state that, as to his clothing, he had "to ask her permission to wear it". (App. 70a) Furthermore, after resigning his post as president of Coronado, which had representative offices in New York City, defendant has been spending substantial amounts of time abroad. (Supp. App. 9b-10b)

After a hearing, and after the defendant was given an opportunity both to develop deposition evidence to support his opposition to the request for an attachment and to submit three separate briefs in support of his position (App. 2a-4a), defendant chose not to contest the basic facts giving rise to liability as set forth in the complaint, but instead, without submitting any supporting affidavit, suggested certain defenses or counterclaims which he indicated he would interpose in this case.

In his brief herein (p. 5), defendant claims that "at the deposition of Mr. Fischer, it was conceded that no financial accommodations were provided by the plaintiff". In fact, Mr. Fischer's testimony was just the opposite, since he verified that a \$250,000 letter of credit had been provided and renewed at the plaintiff's behest in order to secure the \$250,000 loan to Coronado from Banque Scandinave. (Supp. App. 1b-8b) However, after the

loan was renewed in June, 1976, Coronado ran out of money, and, as such, defaulted in the payment of interest. (Supp. App. 1b-8b) Defendant further claims that plaintiff should have paid the interest which Coronado owed with respect to such loan, but it is clear on the face of the agreement that plaintiff had no such obligation. (App. 16a-18a).

There are also vague claims of "misconduct", but these too are totally unsupported.

Based on the evidence submitted, Judge Newman made a finding of facts essentially confirming the allegations of the Complaint, granted plaintiff's application for attachment and ordered defendant to post securities for attachment in Connecticut to secure any judgment which may be rendered against him in this action. (App. 60a-63a).

Defendant then filed a purported notice of appeal from this order and moved in the court below for a stay of the attachment order pending appeal. On January 10, 1977, Judge Newman granted the motion for stay, on condition that the defendant post a bond in the sum of \$150,000. (Supp. App. 11b-13b) Instead of complying with this condition, the defendant then filed a motion for stay with this court. (Supp. App. 34b-41b) This court then denied this motion for stay by order dated January 27, 1977.

Because defendant nevertheless failed to comply with the district court's order, and because he failed to post the bond necessary to obtain a stay under the district court order, by motion

filed February 14, 1977, plaintiff sought to have the defendant held in contempt. (Supp. App. 14b-15b).

The district court then ordered that the defendant appear personally on February 18, 1977, at 10:00 a.m., at a hearing on that motion for contempt. (Supp. App. 16b)

Defendant did not appear personally on that date, and instead chose to submit an affidavit purporting to justify his decision to defy the district court's order. (Supp. App. 17b-24b)

Unwilling to accept this tactic, the court adjourned the hearing until February 23, 1977, again ordered the defendant to appear personally, and advised defendant's counsel that if defendant did not appear personally, defendant would be fined in the amount of \$1,000 per day until he did appear personally. (Supp. App. 24b)

With this encouragement, the defendant did appear on February 23, 1977, and finally did agree to effect certain compliance with the order. Defendant's counsel indicated that fifteen days would be needed before compliance could be effected. (Supp. App. 25b-28b)

Nevertheless, to date, no compliance has been made. (Supp. App. 29b-30b).

Meanwhile, defendant filed a motion for reargument, which the court denied on April 13, 1977. (Supp. App. 31b-33b).

ARGUMENT

This Court Lacks
Jurisdiction To Hear This Appeal

It is established that "an order of attachment (or an order continuing one) is not appealable until a final judgment is entered". W. T. Grant Co. v. Haines, 531 F.2d 671, 678 (2d Cir. 1976); Accord, Rosenfeldt v. Comprehensive Accounting Service Corp., 514 F.2d 607, 610 (7th Cir. 1975); Financial Services, Inc. v. Ferrandina, 474 F.2d 743 (2d Cir. 1973); West v. Zurhorst, 425 F.2d 919 (2d Cir. 1970); United States v. Estate of Pearce, 498 F.2d 847, 849-850 (3rd Cir. 1974) [en banc].

These decisions make it clear that attachment orders are not appealable under 28 U.S.C. §1292(a), even where, as here, as part of said order, the defendant is affirmatively ordered to post appropriate security, Rosenfeldt v. Comprehensive Accounting Service Corp., supra, 514 F.2d 607, 610 (7th Cir. 1975), and even where, as here, the order purports to be an injunction. Financial Services, Inc. v. Ferrandina, supra, 474 F.2d 743 (2d Cir. 1973). See also, W. T. Grant Co. v. Haines, supra, 531 F.2d 671, 678 (2d Cir. 1976), where this court cited Rosenfeldt with approval in support of its refusal to hear an appeal from the granting of an order of attachment by a federal district court in New York relating to property located in the State of Georgia.

Hence, the court will look beyond form and dismiss the appeal where in substance the order is one granting or continuing

an attachment. Financial Services, Inc. v. Ferrandina, *supra*, 474 F.2d 743 (2d Cir. 1973); Rosenfeldt v. Comprehensive Accounting Service Corp., *supra*, 514 F.2d 607, 610 (7th Cir. 1975).

As defendant's own motion for stay directed to this court stated, the "injunctive" relief obtained in this case "was in the nature of an attachment order." (Motion, p. 4, reproduced in Supp. App. 37b). Therefore, this purported appeal falls squarely within the rationale of the above-cited cases which preclude appeal in such circumstances.

These decisions are rooted in sound principles of judicial economy.

As recently noted by the Seventh Circuit in explaining its Rosenfeldt decision,

"[T]he rights of the party subject to the writ of attachment were preserved and protected while the litigation of the main cause of action presumably proceeded to a final determination, at which time a review of all orders of the district court would have been proper." United States for the use and benefit of Hi-way Electric Co. v. The Home Indemnity Company, 549 F.2d 10, 12 (7th Cir. 1977).

Under these circumstances, in view of "[t]he policy of discouraging piecemeal and fragmentary appeals," "[t]here is . . . no point in an appellate court making a determination which may well be shortly mooted." Ronson Corporation v. Liquifin Aktiengesellschaft, 508 F.2d 399, 402 (2d Cir. 1974).

Defendant seems to recognize the problems with his claim of appealability under 28 U.S.C. §1292(a), but claims nonetheless

that the case is appealable under the collateral order doctrine set forth in Cohen v. Beneficial Loan Corporation, 337 U.S. 541 (1949) and/or under Connecticut law permitting an appeal from the grant of a prejudgment remedy in Connecticut state courts.

The contention that Cohen could be applicable to an order granting security, as in this case, was expressly rejected by this court in its prior decisions cited above. Cohen involved an order denying security for costs, and, as such, involved factors fundamentally different from an order granting security, such as is involved in this case. In the case of an order denying security, any right to security is irretrievably lost if no interlocutory appeal is permitted. On the other hand, where an attachment order is granted, the "rights of the party subject to the writ of attachment [are] preserved and protected" pending final judgment. United States for the use and benefit of Hi-way Electric Co. v. The Home Indemnity Co., supra, 549 F.2d 10, 12 (7th Cir. 1977). As Judge Friendly said in West v. Zurhorst, supra, 425 F.2d 919, 921 (2d Cir. 1970):

"... in what we believe to be the Supreme Court's only post-Cohen pronouncement with respect to the appealability of orders of attachment, Mr. Justice Frankfurter said that while an order vacating an attachment that afforded the sole basis for jurisdiction was appealable, [footnote omitted] 'the situation is quite different where an attachment is upheld pending determination of the principal claim,' citing Cushing v. Laird, 107 U.S. 69, 2 S.Ct. 196, 27 L. Ed. 391 (1883). Swift & Co. Packers v. Compania Colombiana del Caribe, S.A., 339 U.S. 684, 689, 70 S.Ct. 861, 94 L. Ed. 1206 (1950)."

Hence, "when a district court has entered an order granting a writ of attachment, replevin, or sequestration, or refusing to vacate one, the order has not been deemed final under §1291" and Cohen is not applicable. Rosenfeldt v. Comprehensive Accounting Service Corp., supra, 514 F.2d 607, 610 (7th Cir. 1975). Accord, W. T. Grant Co. v. Haines, supra, 531 F.2d 671, 678 (2d Cir. 1976); West v. Zurhorst, supra, 425 F.2d 919 (2d Cir. 1970); Financial Services, Inc. v. Ferrandina, supra, 474 F. 2d 743, 745 (2d Cir. 1973); United States v. Estate of Pearce, supra, 498 F.2d 847, 849-850 (3rd Cir. 1974) [en banc].

As to the claim that the court should apply Connecticut law to determine the appealability of this order, it should be evident that Connecticut cannot confer jurisdiction upon this court since "Court of appeals jurisdiction over district court decisions must . . . be granted by the Congress", not the Connecticut legislature. Corn v. Guam Coral Company, 318 F.2d 622, 627 (9th Cir. 1963). As such, "the appealability of the order of course depends upon federal law." Flegenheimer v. General Mills, 191 F.2d 237, 238 (2d Cir. 1951) (L. Hand, J.) [involving the dismissal of an appeal by an intervenor seeking to challenge the validity of an attachment]

In light of the foregoing authority, this court should dismiss this appeal for lack of jurisdiction.

The District Court Attachment
Order Was Proper

A. Connecticut Law

Defendant's principal claim on this appeal seems to be that the relief granted by the district court is not authorized by Connecticut law because the district court's order permits attachment of property which is presently located outside the state, by requiring defendant, over whom it has in personam jurisdiction, to bring that property into Connecticut.

In resolving the validity of this claim, this court should consider the suggestion made in Lomartira v. American Automobile Insurance Company, 371 F.2d 550, 554 (2d Cir. 1967) that:

"In a case like this one, where a question of state law must be determined in a diversity case, great weight should be given the determination of a district judge sitting in that state. A court of appeals should not reverse the considered judgment of the district court on the law of its state unless it believes it to be clearly wrong.⁶ E.g., Bernhardt v. Polygraphic Co., 350 U.S. 198, 204-205, 76 S.Ct. 273, 100 L.Ed. 199 (1956); People of State of California v. United States, 235 F.2d 647, 653-654 (9 Cir. 1956);

"⁶Not infrequently, no member of the panel of a court of appeals is a member of the bar of the state whose law is in question. That is the case here."

It is respectfully submitted that the view of Judge Newman in this case, adopting the position taken by Judge Zampano in Fleming v. Gray Manufacturing Co., 352 F.Supp. 724 (D. Conn. 1973), is not "clearly wrong", but rather represents a proper

application of Connecticut law, in accord with the interests of justice.

The basic authority for the order entered herein is Conn. Gen. Stat. §52-279, which provides that:

"Attachments may be granted upon all complaints containing a money demand against the estate of the defendant, both real and personal"

Under the authority of this statute, Connecticut courts have long recognized "that all the property of a debtor should be holden for the payment of the debts of its owner", Smith v. Gilbert, 71 Conn. 149, 154, 41 A. 284 (1898), and that the right of attachment extends to property of every sort and description:

"When an interest which may be strictly neither goods nor land is nevertheless clearly property, capable of being fairly sold and appraised, which is subject to the debtor's control, and which ought to be responsible for his debts, we say that the policy of the State for two hundred and fifty years clearly indicates that such interest is attachable property within the meaning of the statute." 71 Conn. at 155.

Under the nineteenth century concept which viewed stock as separate from the stock certificate, early Connecticut courts may have thought themselves to be without power to attach stock in foreign corporations, at least where, as in Winslow v. Fletcher, 53 Conn. 390, 4 A. 250 (1885) and Barber v. Morgan, 84 Conn. 618, 80 A. 791 (1911), the two cases relied on by defendant, the court was proceeding quasi in rem, without in personam jurisdiction. This is because such stock was deemed to have its situs at the state of incorporation.

However, this concept of situs was discarded in Connecticut and elsewhere with the enactment of the Uniform Stock Transfer Act, Sections 13 and 14 (the predecessors of Section 8-317 of the Uniform Commercial Code). As one court noted:

"[T]he Uniform Stock Transfer Act has imparted such added value to the certificate, by increasing its negotiability, that the certificate is property within the meaning of attachment statutes and, having been merged, is considered to be the stock itself. Consequently, for the purposes of attachment, the situs of shares of stock is the place where the certificate is located." Westerman v. Gilbert, 119 F.Supp. 355, 358 (D.R.I. 1953).

Conn. Gen. Stat. §42a-8-317 (Section 8-317 of the Uniform Commercial Code) continues to recognize this principle. As comment 1 to this section states:

"In dealing with investment securities the instrument itself is the vital thing"

Thus, under present law, the certificates evidencing securities of foreign corporations are property which can be attached under the general authority of Conn. Gen. Stat. §52-279, which, as noted above, has been construed to authorize attachment of all types of property.

The method for attachment of such securities is by seizure pursuant to Conn. Gen. Stat. §52-280, as facilitated by Conn. Gen. Stat. §41a-8-317(2), which provides that:

"A creditor whose debtor is the owner of a security shall be entitled to such aid from courts of appropriate jurisdiction, by injunction or otherwise, in reaching such security or in satisfying the claim

by means thereof as is allowed at law or in equity in regard to property which cannot readily be attached or levied upon by ordinary legal process."

Thus, under §42a-8-317(2), where the court has in personam jurisdiction, it can order a defendant to produce his securities endorsed in blank, thereby permitting effective attachment of such securities, regardless of their physical location at the time the order is entered and regardless of whether the issuer is a domestic corporation whose shares are attachable under the procedure set forth under Conn. Gen. Stat. §52-289, or a foreign corporation whose shares are attachable under the procedure set forth in Conn. Gen. Stat. §52-280.*

*As the district court recognized, Section 52-289 of the Connecticut General Statutes provides a special procedure for attachment of shares issued by domestic (Connecticut) corporations. Where applicable, it is a useful tool in that it provides a method by which a court, without having in personam jurisdiction over a defendant, can acquire jurisdiction over his securities, provided the certificates can be seized in Connecticut. After judgment, such securities can then be levied upon and transferred to the purchaser at the sheriff's sale by action of the corporation without the necessity of requiring the defendant to endorse the securities in blank [cf. Jack London Pro., Inc. v. Samuel Bronston Pro., Inc., 22 A.D. 2d 870, 254 N.Y.S. 2d 397, 398 (1st Dept 1964)] or otherwise to take any action personally. See Conn. Gen. Stat. §52-267. Obviously, these provisions are particularly significant where, as in Winslow v. Fletcher, 53 Conn. 390, 4 A.250 (1885) and Barber v. Morgan, 84 Conn. 618, 80 A.791 (1911), the two cases relied on by defendant, the court has no in personam jurisdiction and is proceeding on a quasi-in-rem basis. However, they do not preclude attachment of other securities under Conn. Gen. Stat. §§52-579, 52-580 and 42a-8-317.

Defendant claims, however, that Conn. Gen. Stat. §42a-8-317 does not itself authorize in personam relief in aid of attachment, and that there is no authority for an in personam attachment order under Connecticut law. In support of this claim, defendant quotes from I Stephenson, Connecticut Civil Procedure at pp. 269-270, but the quotation is out of context and misleading because of the omission of the underscored language which follows the language cited by defendant:

" . . . The commercial code provides that the attaching creditor is entitled to such aid as the state otherwise provides in obtaining possession of the certificate. This provision does not authorize such aid but merely confirms existing state practice, if any, which makes it available. While there seems to be no Connecticut law on the point, it is 'the settled policy of this State, that all the property of a debtor shall be holden for the payment of the debts of its owner' and the court should show no hesitancy in granting a creditor's bill to implement that policy".

Elsewhere in his treatise, Stephenson notes specifically that there is authority that stock in foreign corporations can be reached by such a "creditor's bill" and that, under Connecticut law, such a bill is available either before or after judgment. II Stephenson, Connecticut Civil Procedure, pp. 959-960.

Furthermore, in stating "that there seems to be no Connecticut law on the point", Stephenson has overlooked applicable

case law authorizing an in personam order to facilitate an attachment of securities. See e.g., White v. Leary, 6 Conn. Supp. 37 (1938) and Fleming v. Gray Manufacturing Co., supra, 352 F. Supp. 724, 726 (D. Conn. 1973).

In particular, as noted above, Fleming v. Gray Manufacturing Company, supra, 352 F. Supp. 724 (D. Conn. 1973), constitutes direct precedent for the order herein. The relief in Fleming, as here, was an attachment order directing the defendants, inter alia, "to deposit with [the] Court" certain foreign securities located outside the state, and unrelated to the transaction giving rise to the debt in question, in order to "secure [that] debt". 352 F. Supp at 725. Defendant's claim (Br. p. 14) that it was something different is inaccurate.

In any event, contrary to the claim that §42a-8-317 does not itself authorize relief in aid of attachment, comment 1 thereto makes clear that the right to appropriate "relief is provided in subsection (2)" itself. The proviso in §42a-8-317(2) limiting equitable relief to such circumstances "as is allowed . . . in equity" merely limits the availability of such in personam relief, pursuant to familiar common law principles, to situations where ordinary legal process is inadequate and the relief is necessary to complete the plaintiff's prejudgment remedy. See White v. Leary, supra, 6 Conn. Sup. 37 (1938).

There can be no question that such circumstances are present here, since defendant has advised that "[a]ll of defendant's securities are located outside of the State of Connecticut." (App. 61a). As such, without the order which was entered, they would be beyond the reach of ordinary legal process.*

The fact that these securities are located beyond the jurisdiction does not mean that the court is powerless to reach

*In denying the motion for reargument herein, Judge Newman indicated that, in his view, Conn. Gen. Stat. §42a-8-317(2) "clearly permits a court with in personam jurisdiction over a defendant to require that defendant to bring his securities into the jurisdiction when the lawsuit seeks to determine ownership of the shares and perhaps other interests in the shares as well". At the same time, he stated that he viewed as less certain the appropriateness of an order such as was granted herein and in Fleming requiring the defendant to post security for the purpose of securing a claim for money damages. Actually, though, under Connecticut law, attachment is not available as a device in aid of an action to determine title or other claim of a pre-existing equitable interest in specific property, but rather is limited to use as a device for securing a demand for money damages. See Conn. Gen. Stat. §52-279; Atlas Garage & Custom Builders, Inc. v. Hurley, 167 Conn. 248, 258, 355 A.2d 286, 291 (1974). Hence, the only proper case for permitting equitable relief in aid of attachment under §42a-8-317(2) would be a case such as this, in which such aid was sought in order to obtain security for a claim for a money judgment.

them. On the contrary, where a court has in personam jurisdiction -- as it clearly does here -- it has the power to enter an appropriate order requiring the defendant to take action with respect to property located outside of the state in order to facilitate an attachment or levy to secure or satisfy a claim for money damages. See e.g., Fleming v. Gray Manufacturing Co., supra, 352 F. Supp. 724 (D. Conn. 1973) [defendant owning securities in foreign corporations, the certificates of which were located outside of the state, ordered to deposit them with the court in order to secure a claim for money damages]; Hodes v. Hodes, 176 Or. 102, 155 P.2d 564 (1945) [debtor ordered to deliver stock certificates located in Washington state to sheriff in Oregon]; Wilson v. Columbia Casualty Company, 118 Oh. St. 319, 160 N.E. 906 (1928) [debtor may be required to bring property into state to answer for his debts]; U.S. v. First Nat. City Bank, 379 U.S. 378, 380, 384 (1965) [order entered in connection with jeopardy assessment under Internal Revenue Code against Uruguayan corporation held to reach assets located at defendant's foreign branch]; See also Mead v. N. York, Housatonic & Northern R.R. Co., 45 Conn. 199, 223 (1877) [action in the nature of a foreclosure may proceed with reference to real property located outside of the state if in personam jurisdiction has been obtained]; Clark Equipment Co. v. Armstrong Equipment Co., 431 F.2d 54 (5th Cir. 1970), reh. den., 434 F.2d 1039, cert. denied, 402 U.S. 909 (1971) [order in the nature

of detinue reaching property in five states held proper]; Restatement, Conflicts, §64 (2d ed. 1969) [court may order action to be taken outside of its jurisdiction].

As this court said in United States v. First National City Bank, 396 F.2d 897, 900-901 (2d Cir. 1968), in the context of an order for production of documents located abroad,

"It is no longer open to doubt that a federal court has the power to require the production of documents located in foreign countries if the court has in personam jurisdiction of the person in possession or control of the material".

Nederlandsche Handel-Maatschappij, N.V. v. Sentry Corp., 163 F.Supp. 800 (E.D. Pa. 1958) apparently interprets Pennsylvania law to preclude a decree relating to property located outside of that state. However, Connecticut follows no such restrictive view of in personam jurisdiction. See e.g., Mead v. N. York, Housatonic & Northern R.R. Co., supra, 45 Conn. 199, 223 (1877); Fleming v. Gray Manufacturing Co., supra, 352 F.Supp. 724 (D. Conn. 1973).

Indeed, notwithstanding Nederlandsche, the intent of the Code itself is made clear by official comment 1 to §42a-8-317 which specifically indicates that "a method of reaching the security approved by the section" is the method used in Hodes v. Hodes, supra, 176 Or. 102, 155 P.2d 564 (1945), where the Oregon court enjoined transfer of securities located in the State of Washington, and ordered the securities brought into the State of Oregon.

The exercise of the court's equitable powers was particularly appropriate here, since unless defendant's assets can be reached here, the defendant will be able to confront the plaintiff with the prospect that any judgment herein would have to be enforced by multiple lawsuits in multiple countries around the globe without the benefit of the full faith and credit clause of the U.S. Constitution.

Since the assets of ordinary Connecticut citizens are readily subject to attachment in any case in which a money judgment is sought, provided probable cause can be established after due notice and hearing, it is only equitable that those who choose to lodge their assets at Swiss banks and other foreign locations should be equally subject to the state's attachment process.

Thus, it is clear that the intent of the Code, as well as more general concepts of the right of a court to order actions to be taken beyond its territorial jurisdiction, permit the relief which was granted in this case, and that such relief is in accord with the interests of justice.

B. Constitutional Claims

While defendant makes the claim that the district court order denies him "procedural due process", it appears that he is not challenging the validity of the Connecticut attachment statutes themselves. In fact, the thrust of his claim is obscure, to say the least.

This is particularly so in that the Supreme Court cases relied on by defendant all involve the propriety of certain statutes which permitted prejudgment attachment or garnishment without a prior hearing. In contrast, in this case, defendant was given a full opportunity to present whatever evidence he chose to present, including the opportunity to take a deposition in Minneapolis, which deposition was then submitted to the court for its consideration in connection with the requested attachment order. Hence, even though defendant chose not to testify or file an affidavit in support of his own position, defendant was permitted the discovery he requested and was in no way restricted from fully presenting his position in advance of the entry of the order appealed from.

The Constitution does not require that a "plaintiff fully establish his claim at the hearing" in order to obtain a prejudgment remedy, Lynch v. Household Finance Corporation, 360 F.Supp. 720 (D.Conn. 1973) [3 judge court], and "[i]t is . . . clear under [the Supreme] Court's precedents that issues can be limited in actions for possession." Mitchell v. W. T. Grant Co., 416 U.S. 600, 607 (1974). As the Supreme Court said in Bell v. Burson, 402 U.S. 535, 540 (1971):

" . . . Since the only purpose of the provisions before us is to obtain security from which to pay any judgments against the licensee resulting from the accident, we hold that procedural due process will be satisfied by an inquiry limited to the determination whether there is a reasonable possibility of judgments in the amounts claimed being rendered against the licensee."

Based upon the evidence before the court, it is clear that plaintiff more than amply satisfied this "probable cause" standard.

In particular, it was undisputed that, as found by the district judge, plaintiff obtained a letter of credit from the First National Bank of St. Paul to secure a loan made to Coronado by the Banque Scandinave en Suisse, that pursuant to the Indemnity and Guaranty Agreement upon which this suit is based, defendant agreed to indemnify and hold plaintiff harmless from any and all liability it might actually be called upon to pay by reason of, inter alia, its obligations under its application for letter of credit, that \$250,000 was paid by plaintiff to the First National Bank of St. Paul after that bank made payment to Banque Scandinave en Suisse under the letter of credit, and that defendant has not yet reimbursed the plaintiff for this \$250,000 payment.

As to the purported counterclaims, Judge Newman properly noted in his opinion that under the Federal Rules, a judge has discretion to treat claims and counterclaims separately, see Rule 54(b) of the Federal Rules of Civil Procedure, and thus can properly treat them as separate matters for purposes of attachment. Hence, the mere assertion of a counterclaim which is not "legally insufficient" on its face (see Def. Br. p.29) does not preclude a finding of probable cause on the plaintiff's complaint.

Furthermore, defendant's "substantial defenses and counterclaims" in this case are totally unsubstantiated.

Defendant claims (Br. p. 5) that "At the deposition of Mr. Fischer, it was conceded that no financial accommodations were provided by plaintiff". This is nonsense, since the facts shown at that deposition were that plaintiff provided \$250,000 in financial accommodations by the provision of the \$250,000 letter of credit, and the extension thereof until 1977. After the extension, Coronado ran out of funds, and, as such, defaulted in the payment of interest. Thereupon, Banque Scandinave en Suisse demanded repayment of its loan and collected the principal thereof by calling the letter of credit. Hence, the default was that of Coronado, rather than that of the plaintiff.

Similarly, defendant's claims of "misconduct" by plaintiff are wholly without foundation in the record.

As Judge Newman observed:

"It is significant that plaintiff has submitted affidavits in support of its claim while the defendant's own claims remain unsubstantiated apart from the allegations of the pleadings and the arguments of counsel."

Under these circumstances, it is clear that the district court's finding of probable cause was fully justified, and that the defendant was not denied his constitutional rights. In fact, as to the \$7,500 worth of property which the defendant admits having in Connecticut, he has posted a bond in lieu of attachment thereof, and this aspect of the court's order is not in dispute.

The opportunity given the defendant to present his case exceeded the opportunity normally accorded to consumers and other average citizens of Connecticut whose bank accounts and

other assets are routinely tied up by their creditors under Connecticut law. Yet, it would appear that the effect of such an order on an affluent person such as the defendant is far less significant than an order tying up the average citizen's life savings. In this context, it would surely be standing the Constitution on its head to hold that, for some reason, defendant's assets cannot constitutionally be subjected to attachment notwithstanding the showing of probable cause which was made in this case.

CONCLUSION

For the foregoing reasons, unless the appeal is dismissed for lack of jurisdiction, the order appealed from should be affirmed in all respects.

Respectfully submitted,

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Dated: April 25, 1977.

CERTIFICATION OF SERVICE

IT IS HEREBY CERTIFIED that service of this Brief and Appendix has been made on opposing Counsel by mailing two (2) copies to Frank W. Murphy, 618 West Avenue, Norwalk, Connecticut 06852, by depositing copies of the same in the United States Mail, postage prepaid as indicated above.



Paul E. Knag

Dated: April 25, 1977